IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 12TH FEBRUARY 2007 / 23RD MAGHA 1928

Crl.Rev.Pet.No. 753 of 2005()

CRA.218/2001 of SESSIONS COURT, MANJERI
ST.2772/2000 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I, MANJERI

.....

REVN. PETITIONER(S): APPELLANT/ACCUSED:

K.C.ABDUL LATHEEF, S/O. CHEKKU,
KOLAKKADAN HOUSE, KARUVARAKUNDU, MALAPPURAM DIST.

BY ADV. SRI.BABU S. NAIR

RESPONDENT(S): RESPONDENTS/COMPLAINANT & STATE:

---

1. P.P.MOHANDAS, S/O. KELUMENON,
PUTHUMANA PUTHANVEEDU, THARISU P.O.,KARUVARAKUNDU,
MALAPPURAM DISTRICT.

2. THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

ADV. SRI.K.M.SATHYANATHA MENON FOR R1
PUBLIC PROSECUTOR SRI.C.K.SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HEMA, J.

Crl. R.P No.753 of 2005

Dated 12th February, 2007.

O R D E R

Petitioner was convicted and sentenced for offence under section 138 of the Negotiable Instruments Act('the Act' for short) to undergo simple imprisonment for three months. The said conviction and sentence were confirmed by the learned Sessions Judge in appeal filed by the revision petitioner. Hence, this revision.

2. According to prosecution, on 15.9.1999, the accused borrowed a sum of Rs.3,00,000/- from the complainant and he issued a post-dated cheque for an amount of Rs.3 lakhs. The cheque was dated 15.10.1999, which was drawn on the account maintained by the revision petitioner. The cheque, on presentation, was dishonoured for want of insufficient fund. A lawyer notice was issued for which a reply was sent, which are marked as Exts.P3 and P5 respectively. The amount was not paid and hence within the statutory time, after complying with the legal formalities, a complaint was filed under section 420 of the Act. The court took cognizance of offence under section 138 of the Negotiable Instruments Act .

3. The complainant examined himself as PW1 and marked Exts.P1 to P5. Exhibits C1 series were also marked. The accused did not adduce any defence evidence. He stated that he has nothing to say while questioned under section 313 Cr.P.C. But, as per Ext.P5 and during cross-examination, the accused came forward with a case that the cheque was not drawn by the accused, as alleged by the prosecution. His case is that a room was taken on lease by the complainant from the accused on a rental basis on 10.10.1994 and in 1997 the complainant expressed his desire to vacate the room. The accused agreed to this, but a demand was made by the complainant to return Rs.10,000/- which was paid as advance. This happened in the dead of night when he had no other option but to draw a blank cheque signed by him and handed it over to him. There was no other money transaction between the parties and accused had not borrowed Rs.3 lakhs, as alleged.

4. On going through the judgment of the trial court, I find

that there is no finding as to whether the cheque was 'drawn' by the accused, as alleged by the prosecution. There is no specific finding to that effect. On the other hand, the court proceeded to draw a presumption under section 118 and 139 of the Act. The court held that it can be inferred that the cheque was made or drawn on the date on which the cheque bears, in view of the presumption under section 118 of the Act. The lower appellate court also does not appear to have proceeded to find out whether the cheque was drawn by the revision petitioner or not. Both the courts did not enter a specific finding as to whether the cheque was drawn by the accused or not.

5. The lower appellate court held that the revision petitioner made no effort to probablise his version except by making a suggestion that the cheque was given in the dead night in the blank form signed by him when a demand was made for paying back the advance of Rs.10,000/- etc. The lower appellate court was of the view that since the accused did not

take any effort to probablise his version, execution of the cheque is proved by the evidence of PW1.

6. There is no discussion regarding the evidence of PW1 with respect to the drawing of the cheque. The lower appellate court found that the revision petitioner could have issued the cheque for Rs.10,000/- at the time when the demand was made for repayment of the amount of Rs.10,000/-. Since he did not explain why in spite of the amount being specified, the revision petitioner chose to issue signed blank cheques. It appears that the court proceeded on the basis of the evidence given by PW1 regarding issuance of a cheque. The sole ground to reject the contention raised in respect of drawing of a cheque is for the reason that no explanation was offered by the accused for not showing the amount of Rs.10,000/- in the cheque.

7. On going through the judgments of the courts below, it is clear that both the courts have not considered the question whether the cheque is drawn by the accused or

whether the cheque was only a signed blank cheque as alleged by accused. As per section 5 read with section 6, a “cheque” is a bill of exchange which contains an order in writing, signed by the maker etc. The definite case of the accused is that in the cheque Ext.P1 produced by the complainant he had not made a conditional order directing the bank to pay Rs.3 lakhs to the complainant. He only stated that he had signed the cheque but his specific case is that he has not made an order in writing as required under Section 5 read with Section 6 of the Act.

8. A reading of sections 5 and 6 of the Act would go to show that there are two parts to constitute a bill of exchange or cheque. The first part is a conditional order in writing directing the bank to pay an amount of money only to a certain person. The second part is the signature of the maker. Unless both these parts are established, there cannot be a cheque as stated in Section 5 read with Section 6 of the Act. When the complainant alleges that Ext.P1 is an instrument which contains an order in writing directing the bank to pay to the complainant

certain amount of money, whereas the accused disputes this and states that on the date on which cheque is alleged to have been executed or drawn such an order was not made and Ext.P1 did not contain an order in writing and the court is bound to enter a finding based on the evidence, circumstance and other materials on record whether on the date of alleged drawing of the cheque, there was a cheque in existence containing the first part which is a conditional order not as referred to in Section 5 of the Act whether it was only a blank cheque leaf without any such conditional order.

9. On going through the judgments of the courts below, I find that both the courts have not taken any effort in this direction in the right perspective. The contentions raised by revision petitioner are not seen considered as required by the court. A decision must be supported by reasoning. The reasoning given must be based on the evidence adduced in the light of contentions raised by both sides. Only an order which is supported by reasons, after considering the rival contentions,

can be stated to be an order in compliance of natural justice.

10. Any order which is passed in violation of natural justice cannot be sustained. The finding entered into by the lower appellate court that due execution of the cheque is proved by the evidence of PW1, is without considering the rival contentions. The omission to consider the rival contentions on the material aspect on the most important ingredient of an offence can be said to be an improper and such impropriety deserves an interference at the hands of the revisional court.

11. It can be seen from the materials on record that the revision petitioner has raised a ground that Ext.P1 was not drawn by him and that there was nothing in the so called instrument to show that accused made a conditional order as required under Section 5 of the Act and that the cheque was a blank cheque leaf which contained only the signature and therefore Ext.P1, which was produced did not constitute a cheque as laid down in Section 5 read with Section 6 of the Act. This contention was raised at the very early stage of the case

itself and he has also put forward the circumstances under which he had handed over the cheque to the complainant.

12. The definite case of the complainant is that the cheque was handed over in 1999 and not in 1997. According to the accused, the blank signed cheque leaf which was handed over in 1997 by the accused to the complainant was forged and misused by the complainant in the year 1999. On going through Ext.P1, it can be seen that the number of the cheque is 128588. Ext.C1 extract of the ledger would show that the previous cheque number 128587 was encashed on 10.6.1997. The defence set up by the accused is that the next cheque leaf was given in the same year 1997 and that it could not have been drawn on the alleged date stated by the complainant. The cheque number 128587 was encashed on 10.6.1997but the very next cheque leaf is alleged to have been drawn on 15.6.1998 after 2 years of the said date. The probability in the defence case or in the prosecution case has to be adjudged in the light of this circumstance.

13. Another contention raised by the accused at the time of cross examination is that the handwriting in Ext.P1, particularly the name of the payee in Ext.P1 and the name of the complainant in the complaint are written by one and the same person. On going through Ext.C1 series, the extract of the cheque written register also it appears that the handwriting of the complainant is available in the relevant column. When a case is put forward that the handwriting in Ext.P1 is not that of the accused but it can be the handwriting of the person who had written in the complaint, the court ought to have verified the records as to whether the contentions raised are correct or not.

14. The complainant has no case that he had not written in the complaint. However, at the time of signing the deposition, he had not written in English but wrote in Malayalam before he signed the deposition. This conduct also is to be borne in mind while appreciating the contentions raised by the accused that his handwriting in the complaint as against

the signature of the complainant and the handwriting in Ext.P1 with respect to the name of the payee is that of the same person. The court below ought to have taken an effort at least to compare and find out whether there is any merit in the contentions raised by the complainant.

15. Neither of the courts below appears to have paid any attention to find out, who wrote in Ext.P1 on the date on which the cheque is allegedly drawn, whether it is done by the accused or not. The court can consider whether the accused himself had written it or under his instructions by somebody else wrote it. The court must pay its attention to the question whether the writing in Ext.P1 is made by the drawer himself in the case or whether it was written under his instruction by any other person or whether it is by the complainant himself.

16. When the accused pointed out to the court that it could be a case where the handwriting in Ext.P1 would be that of the complainant himself the court ought not to have ignored such contention without even discussing this fact in the

judgment. This important contention deserves to be looked into, while appreciating the evidence whether the cheque is actually drawn by the accused or not. But there is no appreciation of evidence on these aspects.

17. If the handwriting in Ext.P1 is proved to be that of the complainant himself, as it appears from the contentions raised by the accused, it would cut at the root of the prosecution case. In that case, the complainant's evidence would be unbelievable. If he has a case that the cheque was filled up by the complainant himself on an understanding between himself and the accused, he would have come forward with clean hands and put forward such case before the court. If the handwriting in the cheque is proved to be that of the complainant, the complainant's case would fall to earth and his case is to be thrown overboard.

18. If the cheque is not drawn by the accused, there is no question of drawing any presumption. It is only in cases where the drawing of cheque is proved that the presumption

under Section 118(a) to (g) applies. Therefore, without entering a finding whether the cheque is drawn by the accused it will be illegal to hold that there is a presumption under any of the sub-clauses of Section 118 of the Act. Learned counsel appearing for the revision petitioner submitted that an opportunity may be given to the accused to prove that the handwriting in the cheque could be the handwriting of the person who had written in the complaint.

19. Learned counsel appearing for complainant argued in the light of the decision reported in **Lillykutty v. Lawrance** (2003(3) KLT 721) that the handwriting in the cheque is totally irrelevant and therefore there is no meaning in allowing the revision petitioner to get the expert opinion to prove the alleged discrepancy. It was also submitted that the accused had sufficient opportunity to get the expert opinion which he had not preferred to get during trial and no opportunity can be afforded to him to prove this relevant aspect.

20. It is true that the Division Bench of this court laid down that no law provides, in the case of cheque the entire body has to be written by the drawer only. There cannot be any dispute on this proposition and I have already held that the handwriting can be either of the drawer, the payee or any other person but the relevant question is whether accused had made the conditional order in writing in Ext.P1 on the date on which cheque is allegedly drawn by him. In the light of the disputed facts that the cheque was not drawn at all on the date on which cheque is allegedly drawn and that the blank cheque has been misused and forged by the complainant, the handwriting in the cheque assumes importance.

21. On considering various facts and circumstances, I find that in the peculiar circumstances of the case, an opportunity has to be given to both sides to establish their respective contentions regarding handwriting. At any rate, trial court has to decide whether cheque is drawn by accused or not.

22. In the result, the conviction and sentence passed

against the revision petitioner are set aside and the case is remanded to the trial court for fresh consideration and disposal in accordance with law. The trial court shall raise a point "whether the cheque was drawn by the accused on 15.8.1999, as alleged by the prosecution or not" and enter a specific finding on this point. The case shall be disposed of in the light of the observations made in this judgment, untrammelled by any of the observations made by this Court.

This revision petition is allowed.

K.HEMA, JUDGE.

Krs